87-64

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD M. NEHER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

1. Does petitioner's conviction for Driving While Intoxicated violate due process since there is no competent evidence in the record that petitioner was operating a motor vehicle?

2. Does a second arrest by itself attenuate the taint of an unconstitutional arrest?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD M. NEHER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

The petitioner Donald M. Neher respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Western District of the State of Missouri entered in the above-entitled proceeding on January 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Western District of the State of Missouri is reported at 726 S.W.2d 362 and is reprinted in Appendix C hereto, pages A6-A11.

The judgment of the Supreme Court of Missouri denying transfer is not reported but is reprinted in Appendix E hereto, page A13.

JURISDICTION

The judgment of the Court of Appeals for the Western District of the State of Missouri was entered on January 13, 1987 (App. C, pp. A6-A11). A petition for rehearing was denied by the Court of Appeals on March 3, 1987 (App. D, p. A12). Petitioner's application to transfer this cause from the Western District Court of Appeals to the Supreme Court of the State of Missouri was denied on April 14, 1987 (App. E, p. A13).

On June 6, 1987, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to July 13, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution provides:

> . . . ; nor shall any person . . . be deprived of life, liberty or property without due process of law . . . ;

The Fourteenth Amendment to the Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was arrested without a warrant for the misdemeanor offense of Driving While Intoxicated by a Norborne[1] city police officer, outside his jurisdiction, an unlawful arrest under the law of Missouri.[2] Although the policeman, Officer Conrad, knew he had no authority to make the arrest (Tr. 10, 15) he detained petitioner approximately fifteen minutes (Tr. 10) until a highway patrolman Trooper Roger Geary, who had been summoned by radio, arrived at the scene (Tr. 6, 7). Immediately upon arrival the patrolman asked the city officer "why the car was sitting on the shoulder" (Tr. 18). The city policeman gave the patrolman petitioner's driver's license (Tr. 28) and advised him:

1. That petitioner had been driving the vehicle (Tr. 26).

2. That the vehicle had been on the wrong side of the road several times (Tr. 26).

3. That petitioner was driving in a very erratic manner (Tr. 26).

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1. The City of Norborne, Missouri, is a city of the fourth class (L.F. 10a).

2. Police officers of fourth class cities do not have the right of "hot pursuit", *City of Advance v. Maryland Casualty Company*, 302 S.W.2d 28 (Mo. 1957).

4. That in the opinion of the city police officer petitioner was intoxicated (Tr. 27).

The highway patrolman did not observe petitioner driving or violating the law in any manner (Tr. 26). The patrolman transported petitioner to the Ray County jail where petitioner was given an alcohol breath test (Tr. 20).

Petitioner filed a motion to suppress in the trial court requesting that all evidence resulting from petitioner's arrest be suppressed "for the reason that said evidence was procured as the result of an illegal arrest in violation of the Fourth and Fourteenth Amendments of the United States Constitution . . ." (App. A, pp. A1-A2). The trial court overruled the motion to suppress and convicted petitioner of Driving While Intoxicated, and fined him $200.00.

Petitioner appealed to the Missouri Court of Appeals, Western District, but the Court of Appeals affirmed petitioner's conviction stating that on the facts of petitioner's case "the *Wong Sun* doctrine does not apply and the trial court properly overruled the motion to suppress . . ." (App. C, p. A11). Petitioner's motion for rehearing filed with the Court of Appeals was denied (App. D, p. A12). Petitioner then filed a motion to transfer the case to the Supreme Court of Missouri which was also denied (App. E, p. A13).

REASONS FOR GRANTING THE WRIT

I.

Does petitioner's conviction for Driving While Intoxicated violate due process since there is no competent evidence in the record that petitioner was operating a motor vehicle?

The first question presented in this case is whether petitioner's conviction for Driving While Intoxicated violates the due process guaranty stated in the Fifth and Fourteenth Amendments to the Federal Constitution since the record is devoid of any competent evidence to prove one of the elements of the charged offense. In Missouri the offense of Driving While Intoxicated[3] requires proof of the act of operating a motor vehicle to sustain a conviction. *State v. Dodson,* 496 S.W.2d 272 (Mo. App. 1973). In petitioner's case, however, the only evidence that petitioner had been operating a motor vehicle was the direct product of an unlawful arrest, and therefore, inadmissible under the exclusionary rule as the "fruit" of the illegal arrest. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407.

The Norborne city officer who stopped petitioner eight miles outside the city limits knew his stop was illegal. He testified: "I don't cite outside the city limits. I don't even stop them outside the city limits . . . . It's not my jurisdiction" (Tr. 10). The trial court made a specific finding that the city officer's arrest was unlawful and even referred to "the taint of the illegal detention by the

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3. Section 577.010 Revised Statutes of Missouri (1986) provides: Driving while intoxicated.—1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition.

Norborne police officers" (App. B, p. A4). The Court of Appeals also specifically held that petitioner's arrest by the Norborne officer was illegal stating "the stopping and detention of appellant was unlawful" (App. C, p. A9).

In *Weeks v. United States,* 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, the Supreme Court held that evidence seized during an unlawful search could not be used as proof against the victim of the search. This "exclusionary rule" applies both to the direct as well as the indirect products of such a violation. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182. In the present case all the evidence gained by the Norborne officer after his illegal stop of petitioner should have been excluded from use against petitioner as the fruit of the unlawful arrest. This includes the city officer's observation that petitioner had been operating a motor vehicle.

The only other witness to testify at trial was Patrolman Geary, who arrived at the scene fifteen minutes after the illegal stop and never saw petitioner driving. All Geary's information concerning the person operating the vehicle came from the city police officer who made the illegal stop. Without the city officer's testimony that petitioner had been driving there was no other proof of this element of the offense.

In *Thompson v. Louisville,* 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, the defendant had been convicted by the Police Court of Louisville, Kentucky of loitering and disorderly conduct. The evidence presented to support the loitering charge was that the defendant had entered a cafe and had been dancing by himself to the music on the jukebox for approximately thirty minutes. His behavior was not offensive and the manager of the cafe did not object to the defendant's conduct. When two police-

men on a "routine check" arrested the defendant for loitering they also charged him with disorderly conduct because they said defendant "was very argumentative." In a unanimous opinion by Justice Black quoting *DeJonge v. Oregon,* 299 U.S. 353, 362, 81 L.Ed. 278, 57 S.Ct. 255, the court stated "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." The court held that there was no evidence in the record to support either charge and reversed the defendant's convictions.

In *Vachon v. New Hampshire,* 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664, the defendant was convicted of violating a state statute against knowingly or willfully contributing to the delinquency of a minor. The state's evidence was that a fourteen-year-old girl had purchased a button inscribed "Copulation Not Masturbation" at defendant's store when defendant was not in the store. The Supreme Court found that the record contained no evidence to support the "knowingly or willfully' element of the offense since there was no proof that the defendant had sold the button or that he knew it had been sold or that he had authorized the sale. The court quoted from *Harris v. United States,* 404 U.S. 1232, 1233, 30 L.Ed.2d 25, 92 S.Ct. 10 and said:

> In these circumstances, the conviction must be reversed. 'It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process.'

In petitioner's case the state failed to prove a crucial element of the charged offense by any competent evidence. Since the only evidence that petitioner was operating a motor vehicle was the inadmissible fruit of an

unlawful arrest petitioner's conviction violates the due process guaranty of the Fifth and Fourteenth Amendments of the Constitution and must be reversed.

II.

Does a second arrest by itself attenuate the taint of an unconstitutional arrest?

The decision of the Missouri Court of Appeals, Western District held that petitioner's arrest by a police officer outside his jurisdiction was unlawful, but the court then affirmed petitioner's conviction stating that petitioner's second arrest by an officer with jurisdiction was based upon evidence sufficiently distinguishable from the unlawful arrest to be free from the taint of the unlawful arrest. The court's decision, which is now law in Missouri, stands for the proposition that a second arrest in and of itself constitutes a sufficient attenuation of the causal connection between an illegal arrest and subsequently acquired evidence to avoid the effect of the exclusionary rule.[4] The Missouri Court's decision conflicts with the Supreme Court holding in *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254, where the court considered and rejected a similar decision by the Supreme Court of Illinois.

In *Brown v. Illinois* the Supreme Court of Illinois held that Miranda warnings given a defendant after his illegal arrest, alone and per se, attenuated the taint between the defendant's unconstitutional arrest and his confession given less than two hours after the arrest. The defendant had been arrested in his apartment without a warrant and without probable cause and then taken to the police station where he had received the warnings required

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4. *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341.

by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. The defendant then made two inculpatory statements concerning a murder. In an opinion written by Justice Blackmun the court said,

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted (422 U.S., p. 602).

Instead of a per se rule the *Brown* court stated several factors to be considered to determine whether evidence has been obtained by exploitation of an illegal arrest:

> 1. Temporal proximinty between the illegality and the evidence.
>
> 2. Presence of intervening circumstances.
>
> 3. Purpose and flagrancy of the official misconduct (422 U.S., p. 603-604).

If the facts of petitioner's case are evaluated against these factors there is an obvious lack of attenuation between petitioner's illegal arrest and the evidence derived from the second arrest.

Temporal Proximity. There was a delay of fifteen minutes between petitioner's illegal arrest and the evidence acquired subsequent to his "second arrest." Patrolman Geary arrived at the scene fifteen minutes after the illegal arrest and took custody of petitioner directly from the city officer. The observations of petitioner's behavior about which Patrolman Geary testified occurred at the scene of the illegal arrest.

Presence of Intervening Circumstances. In *Wong Sun* the court held that the defendant's release on his own

recognizance for several days after his illegal arrest was an intervening circumstance sufficient to attenuate the connection between the arrest and his subsequent confession (371 U.S., p. 491). In petitioner's case, however, Patrolman Geary took custody of petitioner directly from the city officer and there were no intervening circumstances between the illegal arrest and the patrolman's observations.

Purpose and Flagrancy of the Officer's Misconduct. Petitioner's arrest was not simply a technical violation of his Fourth Amendment right. As in *Brown* the impropriety of petitioner's arrest was obvious even to the city officer who, with full knowledge of his lack of jurisdiction, arrested petitioner eight miles outside his jurisdiction and into the next county. Despite this knowledge, however, the city officer continued the illegal arrest almost fifteen minutes until a patrolman finally arrived.

The exclusionary rule was designed to prevent exactly the type of police misconduct which occurred both in *Brown* and in petitioner's case—where the officer knows his actions are illegal but then goes ahead and violates the person's rights anyway. If a second arrest, by itself, is held to attenuate the illegality of an unlawful arrest then there will be no incentive to avoid constitutional violations, and illegal arrests will be encouraged by the knowledge that evidence derived therefrom can be made admissible by the simple expedient of a second arrest.

Petitioner's second arrest by Patrolman Geary did not, by itself, attenuate the taint from the Norborne Officer's unlawful arrest, and therefore, the evidence obtained subsequent to the second arrest should have been excluded from use against petitioner as the fruit of an unlawful arrest.

CONCLUSION

For the above reasons this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
CIRCUIT COURT OF RAY COUNTY,
MISSOURI
AT RICHMOND

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. .....
	)	
DONALD MARTIN NEHER,	)	
	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE

COMES NOW the defendant, Donald Neher, by and through his attorney and moves the Court to suppress as evidence in this case certain items that the State intends to use as evidence, to-wit:

1. The results of a breath analysis conducted by Corporal R. E. Geary, Missouri State Highway Patrol on August 21, 1985.

2. Any and all other evidence including observations, facts or conclusions concerning the sobriety of the defendant on August 21, 1985.

3. All statements taken from the defendant on August 21, 1985, and other evidence, tangible or intangible, obtained directly or indirectly arising from defendant's arrest on August 21, 1985, by law enforcement officers

including Officers Richard Conrad, and Dana Wheeler of the Norborne Police Department and Corporal Roger Geary of the Missouri State Highway Patrol for the reason that said evidence was procured as the result of an illegal arrest in violation of the Fourth and Fourteenth Amendments of the United States Constitution and in violation of Article I Section 15 of the Missouri Constitution and in violation of Section 542.276, R.S.Mo. 1978 and specifically for the following reasons:

1. That defendant is aggrieved by the illegal arrest and the unlawful search and seizure and there is pending a criminal proceeding against him growing out of the subject matter of the arrest and seizure.

2. That the arrest and subsequent procedures including the breath analysis were made without a valid warrant and without legal authority.

3. That all the above described evidence was obtained in violation of defendant's rights and therefore is not admissible.

WHEREFORE, defendant prays that this Court issue an order suppressing the above described evidence for the reason that it was procured as a result of an illegal arrest, search, and seizure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 6th day of January, 1986, to:

Mr. Werner A. Moentmann
121 East Lexington
Richmond, Missouri 64085

/s/ Farrell D. Hockemeier
Farrell D. Hockemeier

APPENDIX B

TRANSCRIPT OF TRIAL COURT JUDGMENT

[36] (2/26/86)

THE COURT: This is a continuance of the matter of the State of Missouri vs. Donald Martin Neher, Case No. CR485-1063T. Today, the 26th of February, the court is prepared to hand down a ruling on the case, having taken under advisement last week the matter of the defendant's motion to suppress the evidence in the matter.

The court would make the following findings of fact and, considering that, and the following ruling: The court finds that the actions of the Norborne police officer did constitute an illegal detention of the defendant at the time; but the court is also going to find that the test here to be applied in this case is, in accordance to the ruling in Wong Son, that's W-o-n-g S-o-n, vs. United States, that the true test is not the "but for" test; in this case, not the fact that the individual would have been arrested by Trooper Gerry but for the fact that he was illegally detained by the Norborne police officer. But, rather, the correct test is the whether or not the evidence that led to Trooper Gerry issuing the citation on the defendant for driving while intoxicated came as a result of any exploitation of illegal arrest, but rather by means of a sufficiently distinguishable evidence, therefore, to purge the evidence obtained from the taint of the illegal detention by the Norborne police officers.

[37] It is the feeling of this court that Trooper Gerry had already received radio dispatches concerning the need

to intercept and stop the vehicle operated by the defendant, indicating that the vehicle had been erratically driven on the roadway and that there was belief by the officers following, the Norborne police officers following the defendant, before they took the steps to stop him, that the operator of the vehicle, whoever it might be, was possibly intoxicated.

It is also believed by this court that the actions of the Norborne police officers in stopping the vehicle was made in good faith, they having received a request from the Ray County Sheriff's Department to go ahead and stop the vehicle before he could perhaps cause an accident and injury to some third party, that their actions in stopping him were in good faith and that there was no flagrancy or improper purpose in the illegal detention by the officers.

It is the belief of this court that the trooper had independent knowledge and probable cause, based on the radio dispatches; that he would have stopped the vehicle whenever he did intercept it; and, therefore, the personal observations that he made of the defendant at the time he arrived at the scene, of the defendant's conduct, and his field sobriety tests that he gave the defendant would have been given once he had stopped the vehicle on his own, had he [38] intercepted it later; and, therefore, that these personal conducts of the defendant that he used in basing a lot his decision to take the defendant under arrest and to have him submit to a breathalyzer test are not a result of the illegal detention.

As a result, the court finds the defendant guilty of the charge of driving while intoxicated, and will set sentencing on the matter down for two weeks from today on the 12th of March, 1986, at 1:30.

That's all.

APPENDIX C

NOTICE

This Opinion Is Not Final Until All Post Handdown Motions Have Been Disposed Of And The Mandate Issued And Received.

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. WD 38187
DONALD MARTIN NEHER, Appellant.	)	

Opinion Filed: January 13, 1987

Appeal From the Circuit Court of Ray County
Honorable David L. Busch, Associate Circuit Judge

Before Pritchard, P.J., Kennedy and Lowenstein, JJ.

In a trial to the court, appellant was convicted of driving while intoxicated in violation of § 577.010, RSMo 1978, and was fined $200.00.

At 8:45 p.m., on August 24, 1985, City police officers Conrad and Wheeler were sitting in their marked patrol car just within the city limits of Norborne, Carroll County, Missouri. They observed appellant driving a Ford Escort west on M-10 Highway within the city limits when it

crossed the center line and caused a car to pull off the highway. As he left the city limits, he forced another car to pull off the highway. The officers began to follow the vehicle so they could observe it. After appellant reached the 55 miles per hour speed zone, he drove at about 33 to 35 miles per hour. When he had cars meeting him, he would drive right at the lights, and on passing them he would drive off the other side of the road or on the shoulders, back and forth. When there was no traffic coming at him he did not cross the center line.

Conrad notified the Carroll County Sheriff's Department and asked for a trooper but one was not available so he continued to follow the vehicle, keeping it in sight. At about 2.3 miles from the Norborne city limits, Conrad called Ray County on the radio and learned they were working to get a trooper out also, and then he got notification that the trooper was en route, and the Ray County sheriff instructed him to stop the car and get it off the highway.

Conrad turned on the patrol car lights and stopped the vehicle, approached it and appellant then rolled down his window. Conrad noticed a very heavy odor of alcohol. He told appellant he was from Norborne, and there was a trooper en route, and that he would like him to remain in the vehicle because of his erratic driving. He asked appellant if he would mind and he said no. Appellant did show him his driver's license, and Conrad took the license and kept it until the trooper arrived. Conrad testified that he did not place him under arrest or issue any type of citations to him, and the officers just stayed there directing traffic until Trooper Roger Gerry arrived about 9:15 p.m. Gerry asked appellant to get out of the car, and when he did he was stumbling and holding

onto the vehicle to stand up. He was mumbling and got rather combative.

When Trooper Gerry arrived for the purpose of stopping the car, he found it to be already stopped. He asked appellant to step out of his vehicle, and as they proceeded to the patrol car, appellant was unstable on his feet, and Gerry reached for his arm which he did not appreciate and they had a discussion about it. Gerry noticed a strong odor of alcohol on appellant, and on two passengers in the car. He did not run a field sobriety test on appellant, feeling he was so unstable that he did not want him to injure himself, so he waited until he got to the sheriff's office, where appellant did poorly on the tests causing Gerry to believe that he was definitely intoxicated. A breathalyzer test was performed showing that appellant had a BAC of .27 of 1 percent.

In his sole point appellant contends that the trial court erred in overruling his motion to suppress evidence of his intoxication because it was the product of an illegal arrest in that it was done by a fourth class city police officer outside his jurisdiction.

In the case of City of Advance v. Maryland Casualty Company, 302 S.W.2d 28, 32 (Mo. 1957), it was held that a police officer, the city marshal of a fourth class city (such as Norborne here) was not empowered to go beyond the limits to effectuate an arrest without process under the statute, now § 85.610 RSMo 1978. Albeit that Conrad was instructed by the sheriff of Ray County over the radio to stop appellant's car and get it off the highway, Conrad nonetheless had no power to stop appellant and arrest him. That an arrest actually occurred is borne out by the facts that Conrad put on the red lights of his patrol car, causing appellant to pull over and stop;

that Conrad went to the car and told appellant he was from Norborne and that there was a trooper en route; and that he would like him to remain in the vehicle because of his erratic driving. Conrad then had on his badge, was wearing a gun, and was driving a marked patrol car. He retained appellant's driver's license, which he had shown him, until Trooper Gerry arrived, and then gave it to the trooper, the Norborne officers telling him that they believed that appellant was intoxicated.

Appellant correctly refers to United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, 509 (1980), for the proposition that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. See also Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660, 667 (1979), for the statement that the stopping of an automobile and detaining its occupants constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention brief. Under the facts here, that Conrad put on his red lights and stopped the vehicle; told appellant that a trooper was en route; requested him to remain in the vehicle; and took the driver's license and retained it, appellant reasonably would have believed that he was not free to leave. Since Conrad had no authority to make arrests beyond the city limits of Norborne, the stopping and detention of appellant was unlawful. That, however, does not end the inquiry, which is whether the subsequent and second arrest by Trooper Gerry was tainted by the unlawful arrest by officer Conrad, as to amount to "fruit of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), so as to

make the evidence subsequently ascertained by Trooper Gerry subject to appellant's motion to suppress it.

On cross-examination, Trooper Gerry testified further: He was south of Richmond on 13 Highway when he received a call that a Norborne officer believed he had an intoxicated driver and they wanted Gerry to be en route to intercept him, to watch for the vehicle which was what he was doing. He was told that the vehicle was outside the Norborne city limits, and that the Norborne officer had stopped him as he was arriving. He heard the Ray County sheriff's office telling the Norborne officer to stop the vehicle before it caused an accident. Before Gerry talked with appellant, Conrad told him that the vehicle had been on the wrong side of the road several times and was driving in a very erratic manner, but as far as the intoxication, that was Gerry's own observation, although the Norborne officers told him they believed he was intoxicated. Clearly, all of the evidence of appellant's intoxication was obtained by Trooper Gerry, who arrested him (the second arrest) based upon his own investigation which was, therefore, not discovered through any exploitation of the first arrest. "[T]he proper focus is whether the evidence has been discovered through an exploitation of the illegality or instead through means sufficiently distinguishable to be purged of any taint." Settle v. State, 679 S.W.2d 310, 320[18] (Mo. App. 1984). State v. Lynch, 528 S.W.2d 454, 459[8] (Mo. App. 1975), State v. Thomas, 491 S.W.2d 328, 330 (Mo. 1973), and other cases were cited as those "which made it clear that the doctrine of the fruits of the poisonous tree is inapplicable if the evidence emanated from an independent source, or the causal connection between the primary illegality and the prosecution's proof became so attenuated as to dissipate the taint." See also State v. Reasonover, 700 S.W.2d

178, 183[8, 9] (Mo. App. 1985). Under the facts here, the Wong Sun doctrine does not apply, and the trial court properly overruled the motion to suppress Trooper Gerry's testimony.

The judgment is affirmed.

All concur.

Jack P. Pritchard, Presiding Judge

APPENDIX D

MISSOURI COURT OF APPEALS
Western District
1300 Oak Street
Kansas City, Mo. 64106-2970

Peggy J. Stevens
Clerk Docket Attorney

Area Code 816 474-5511
March 3, 1987

IMPORTANT NOTICE

TO : ALL ATTORNEYS OF RECORD
RE : State vs. Neher, Donald
WD# : 38187

Please be advised that Appellant's motion for rehearing was OVERRULED and transfer to Supreme Court was DENIED. See Rule 83.03.

PEGGY STEVENS MCGAW, CLERK

cc: Werner Moentmann
Farrell Hockemeier

APPENDIX E

No. 69224
WD 38187

IN THE SUPREME COURT OF MISSOURI
January Session 1987

State of Missouri, Respondent,
vs. TRANSFER
Donald Martin Neher, Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1987, and on the 14th day of April 1987, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 14th day of April, 1987.

/s/ Thomas F. Simon Clerk.